PD-0048-20
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 7/20/2020 4:52 PM
Accepted 7/21/2020 10:03 AM
DEANA WILLIAMSON
CLERK

PD-0048-20

FILED
COURT OF CRIMINAL APPEALS
7/21/2020
DEANA WILLIAMSON, CLERK

IN THE COURT OF CRIMIAL APPEALS

AUSTIN, TEXAS

DAVID ASA VILLARREAL
Appellant

vs.

THE STATE OF TEXAS,
Appellee

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
COURT OF APPEALS, FOURTH DISTRICT OF TEXAS
CAUSE NUMBER 04-18-00484-CR

BRIEF FOR THE APPELLANT
DAVID ASA VILLARREAL

EDWARD F. SHAUGHNESSY, III
ATTORNEY-AT-LAW
206 E. LOCUST
SAN ANTONIO, TEXAS 78212
(210) 212-6700
(210) 212-2178 (fax)
SBN 18134500
Shaughnessy727@gmail.com

ORAL ARGUMENT REQUESTED

ATTORNEY FOR THE APPELLANT

TABLE OF CONTENTS

PAGE(S)

TABLE OF INTERESTED PARTIES

Ms. Kimberly Gonzalez Assistant Criminal District Attorney Bexar County, Texas	State's Trial Counsel
Mr. Alex Scharff Attorney at Law 222 E. Main San Antonio, Texas 78205	Trial Counsel
Honorable Jefferson Moore Judge Presiding 186th Judicial District Court Bexar County, Texas	Trial Court Judge
Edward F. Shaughnessy, III Attorney at Law 206 E. Locust Street San Antonio, Texas 78212 (210) 212-6700 Bar No: 18134500	Appellant's Counsel
Andrew Warthen Assistant Criminal District Attorney Bexar County, Texas	Appellee's Counsel

TABLE OF AUTHORITIES

PAGE

UNITED STATES CASES

STATUTE(S) AND CODE(S)

NO. PD-0048-20

DAVID ASA VILLARREAL, Appellant	§	IN THE COURT OF
	§	CRIMINAL APPEALS
v.	§	
THE STATE OF TEXAS, Appellee	§	AUSTIN, TEXAS

BRIEF FOR THE APPELLANT
DAVID ASA VILLARREAL

To the Honorable Court of Criminal Appeals:

Now comes, David Asa Villarreal, by and through Edward F. Shaughnessy, III, attorney for the appellant, and files this brief in cause number PD-0048-20. The appellant was indicted by a Bexar County grand jury for the offense of Murder in cause number 2016-CR-0549. (C.R.-4) Following a jury trial, the appellant was found guilty of the offense as charged in the indictment. (C.R.-) The jury assessed punishment at sixty (60) years of confinement in the Institutional Division of the Texas Department of Criminal Justice. (C.R.-) Notice of appeal was filed and an appeal, alleging two points of error, followed. (C.R.-) On December 27, 2019 the Fourth Court of Appeals affirmed the appellant's conviction in a published opinion authored by Chief Justice Marion. *Villarreal v. State, 596 S.W.3d 338 (Tex. App.-San Antonio, 2019).* The appellant, acting through the undersigned, subsequently filed a Petition for

Discretionary Review with this Court. This Court granted that petition on June 17, 2020. This brief is filed pursuant to the order of this Court, entered on July 8, 2020, mandating that a brief on the merits be filed by the appellant on or before August 3, 2020.

APPELLEE'S SOLE GROUND FOR REVIEW

THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING THE APPELLANT'S RIGHT TO CONFER WITH HIS COUNSEL DURING AN OVERNIGHT RECESS TO MATTERS OTHER THAN HIS ONGOING TRIAL TESTIMONY

SUMMARY OF APPLICABLE FACTS

As noted above this matter involves a scenario that occurred during the course of the guilt-innocence phase of the appellant's jury for the offense of murder.

Following the presentation of the State's case-in-chief the appellant was called as a witness. Prior to the conclusion of the testimony of the appellant the Court recessed for the remainder of the day. (R.R.5-137) After the jury had departed the courtroom, the trial court engaged in a discussion with counsel for the appellant. That discussion forms the foundation for the appellant's ground for review and was summarized by the Court below in the following terms:

> THE COURT: . . . Mr. Villarreal, we're in an unusual situation. You are right in the middle of testimony. Normally your lawyer couldn't come up and confer with you about your testimony in the middle of having the jury hear your testimony. And so I'd like to tell you that you can't confer with your attorney but the same time you have a Fifth Amendment [*sic*] right to talk to your attorney.
>
> So I'm really going to put the burden on [trial counsel] to tell you the truth. . . . I'm going to ask that both of you [trial counsel] pretend that Mr. Villarreal is on the stand. You couldn't confer with him during that time.

Now, Mr. Villarreal, if—puts us in an odd situation. But I believe if you need to talk to your attorneys, I'm not telling you, you can't talk to them. But I'm going to rely on both [trial counsel] to use your best judgment in talking to the defendant because you can't—you couldn't confer with him while he was on the stand about his testimony. So I'm going to leave it to both of your good judgment of how you manage that, if for some reason he believes he needs to confer.

[TRIAL COUNSEL 1]: All right. So just so I am clear and don't violate any court orders, that—because he is still on direct and still testifying, that it is your ruling that we cannot confer with our client?

THE COURT: Let me help you with that. For instance, suppose we go into a sentencing hearing and you need to start talking to him about possible sentencing issues, you can do that. Does that make sense? I don't want you discussing what you couldn't discuss with him if he was on the stand in front of the Jury.

[TRIAL COUNSEL 1]: Okay.

THE COURT: His testimony. I'm not sure whatever else you'd like to talk with him about while he's on the stand. But ask yourselves before you talk to him about something, is this something that—manage his testimony in front of the jury? Does that make sense to you?

[TRIAL COUNSEL 1]: Sure, it does.

[TRIAL COUNSEL 2]: We aren't going to talk to him about the facts that he testified about.

THE COURT: All right. Fair enough. But at the same time—I'm going to put the burden on the lawyers, not on him, because he has a constitutional right to confer with you. . . .

[TRIAL COUNSEL 1]: Okay. All right. I understand the Court's judgment and just—just for in the future, I'm just going to make an objection under the Sixth Amendment that the Court's order infringes on our right to confer with our client without his defense.

THE COURT: Objection noted.

In the Court below the appellant asserted that the action of the trial Court improperly restricted his counsel from consulting with him during the course of the presentation of the defense case, thereby violating his right to the assistance of counsel as guaranteed by the Sixth Amendment to the Constitution of the United States. In support of that assertion of a Sixth Amendment violation the

appellant relied upon the holding of the Supreme Court in *Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d (1976).*

The opinion of the lower Court rejected the contention advanced by the appellant and affirmed the conviction. The Court reasoned as follows:

In the absence of any guidance from the court of criminal appeals or any of our sister courts in Texas, and based on the Supreme Court's decisions in *Geders* and *Perry*[1], we hold the trial court had discretion to limit Villarreal's right to confer with his attorneys during an overnight recess to topics other than his ongoing testimony. Both *Geders* and *Perry* acknowledge "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." *Perry*, 488 U.S. at 281; *see also Geders*, 425 U.S. at 88. Although *Geders* instructs that the trial court had no discretion to prohibit Villarreal and his attorneys from discussing "anything," it did not do so. Rather, the trial court expressly recognized Villarreal's constitutional right to confer with his counsel and put the onus on counsel to ensure any discussions avoided the topic of Villarreal's testimony. Villarreal's attorneys repeatedly confirmed they understood the trial court's order. Accordingly, in this matter of first impression in Texas, we conclude the trial court did not abuse its discretion in limiting Villarreal's right to confer with his counsel during an overnight recess to matters other than his ongoing trial testimony.

[1] Perry v. Leeke, 488 U.S. 272, 109 S.Ct. 534, 102 L.Ed.2d 624 (1989).

ARGUMENT AND AUTHORITIES IN SUPPORT OF THE APPELLANT'S SOLE GROUND FOR REVIEW

The appellant would respectfully submit that the opinion of the Court below fails to adequately account for the holding in *Geders* and erroneously applies the holding of *Peery* to the facts as they unfolded in the instant trial. Further examination of those two holdings is warranted.

GEDERS V. UNITED STATES

In *Geders,* the trial court ordered the defendant to refrain from conferring with his attorney during an overnight trial recess between the defendant's direct and cross examinations. *Id.* at 92, 96 S.Ct. at 1337. The Supreme Court held that the trial court's order violated the defendant's right to assistance of counsel because, among other things, an overnight trial recess provides a defendant the opportunity to discuss with counsel the significance of the day's events. *Id.* at 88, 96 S.Ct. at 1335. The Court, however, explicitly held that it was not addressing limitations that were imposed in other circumstances. *Id.* at 92, 96 S.Ct. at 1337.

The appellant would submit that the holding in *Geders, id.* is consistent with other holdings of the Supreme Court wherein the parameters of the Sixth Amendment are discussed in the context of the need, on the part of the appellant/accused, to demonstrate prejudice.

The Court has uniformly found constitutional error without any showing of prejudice when trial counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding by the actions of the trial Court. *See e.g:* *Geders*; id. *Herring v. New York*, 95 S.Ct. 2550 (1975); *Brooks v. Tennessee*, 92 S.Ct. 1891 (1972); *Hamilton v. Alabama*, 82 S.Ct. 157, (1961); *White v. Maryland*, 83 S.Ct. 1050, 1051 (1963); *Ferguson v. Georgia*, 81 S.Ct. 756 (1961); *Williams v. Kaiser*, 65 S.Ct. 363 (1945).

PERRY V. LEEKE

In *Perry v. Leeke*, id, the Supreme Court addressed the question of whether the rule it announced in *Geders* applied to an order prohibiting counsel from speaking with his client during a 15-minute afternoon recess that occurred in the middle of the defendant's testimony. The Court held that, "in a short recess in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice." *Id.* at 284, 109 S.Ct. at 602. According to the Supreme Court, what was controlling in *Geders* was the fact that during an overnight recess it would be normal for the defendant to discuss matters on which the defendant has a constitutional right to seek advice, such as trial strategy and the availability of other witnesses. *Id.* The Court acknowledged that "the line between the facts of

Geders and the facts of [*Perry*] is a thin one," but stated that "[i]t is, however, a line of constitutional dimension." *Id.* at 280, 109 S.Ct. at 600. *Perry* therefore clarifies the rule announced in *Geders,* making clear that not every prohibition on attorney consultation during trial violates the Constitution.

The *Perry* Court reiterated that an accused's constitutional right to counsel, under the Sixth Amendment, is of "fundamental importance," *id.* at 279, 109 S.Ct. 594, but emphasized that there is no constitutional right to discuss testimony with counsel while that testimony is in progress, *id.* at 281, 284–85, 109 S.Ct. 594. The Court further explained that when a defendant assumes the role of witness, "the rules that generally apply to other witnesses ... are generally applicable to him [or her] as well." *Id.* at 282, 109 S.Ct. 594. Thus, "during a brief recess in which there is a virtual certainty that any conversation between the witness and the lawyer would relate to the ongoing testimony," the trial judge has "the power to maintain the status quo" by briefly barring attorney-client communications. *Id.* at 283–84, 109 S.Ct. 594. The Court held that "[t]he interruption in *Geders* was of a different character because the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the defendant's own testimony." *Id.* at 284, 109 S.Ct. 594. In contrast, during a "short recess in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice," and the trial court may bar consultation. *Id.* The *Perry* Court

acknowledged that the "line between the facts of *Geders* and the facts of [*Perry*] [was] a thin one." *Id.* at 280, 109 S.Ct. 594. Nevertheless, it was "a line of constitutional dimension." *Id.*

An examination of the holding of the Court below reveals that, based upon that Court's examination of the trial Court record, the instant case warrants resolution under the holding of *Geders*. The dissent in the Court below would find that the matter is controlled by the holding in *Geders*. The appellant asserted in his Petition for Discretionary Review that the holding of the Fourth Court warranted review by this Court for three distinct reasons. The record and the precedent presented to this Court requires this Court to ascertain on which side of the "line of constitutional dimension" this matter falls. The appellant would urge that this Court find that the *Geders* scenario is applicable to the instant matter, as opposed to the *Perry* scenario.

The appellant would urge that the holding in *Gevers* warrants application to the instant case because the holding below relies unjustifiably, on what it refers to as the trial Court's discretion to sequester witnesses. *Villarreal v. State, supra, at 324.* The trial Court's authority to "sequester" witnesses has foundation both in the Rules of Evidence[2] and the Code of Criminal Procedure.[3] Neither of those two provisions have any applicability to the accused in a criminal case because of the fact that the accused enjoys a right during the

[2] Rule 614, Tex. R. Evid.
[3] Art. 36.03, Tex. Code Crim. Proc. Ann. (West 2020)

course of a trial that a mere witness does not enjoy: that is the right to confront the witnesses against him.[4]

Moreover the holding below fails to adequately account for the fact that even under the language of the *Perry* opinion, the appellant enjoys a Sixth Amendment right to consult with his counsel regarding "trial tactics". That "basic right" also encompasses the right of the accused to include in his consultation with counsel "consideration of the defendant's ongoing testimony". *Perry, id. at 602*. The ruling of the trial Court in the instant case restricted that right to such a degree as to amount to a violation of the appellant's right to assistance of counsel, during a critical stage of the proceedings, as guaranteed by the Sixth Amendment. *United States v. Cavallo, 790 F.3d 1202 (11th Cir. 2015); United States v. Johnson 267 F.3d 376 (5th Cir. 2001).*

[4] Art. 1.05, Tex. Code Crim. Proc. Ann. (West 2020)

CONCLUSION AND PRAYER

Wherefore premises considered the appellant, David Asa Villarreal, would respectfully request that this Court reverse the judgment of the Fourth Court of Appeals and remand the matter to the 186th District Court of Bexar County for purposes of a new trial.

Respectfully submitted,

Edward F. Shaughnessy

_____

Edward F. Shaughnessy, III
Attorney at Law
206 E. Locust
San Antonio, Texas 78212
(210) 212-6700
(210) 212-2178 (fax)
SBN 18134500
Shaughnessy727@gmail.com

Attorney for the appellant
David Asa Villarreal

CERTIFICATES OF SERVICE

I, Edward F. Shaughnessy, III, attorney for the appellant hereby certify that a true and correct copy of the instant brief was delivered to Andrew Warthen, counsel for the appellee, at 101 W. Nueva, San Antonio, Texas 78205, by use of the United States Postal Service on the _21st__ day of July, 2020.

Edward F. Shaughnessy

_____

Edward F. Shaughnessy, III

I, Edward F. Shaughnessy, III, attorney for the appellant hereby certify that a true and correct copy of the instant brief was delivered to Stacy Soule, State Prosecuting Attorney at P.O. Box 13046, Austin, Texas 78711, by use of the United States Postal Service on the _21st__ day of July, 2020.

Edward F. Shaughnessy

_____

Edward F. Shaughnessy, III

CERTIFICATE OF COMPLIANCE

I, Edward F. Shaughnessy, III, hereby certify to this Court that the instant document contains 2,840 words.

Edward F. Shaughnessy

Edward F. Shaughnessy, III